Indiana Department of Education

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

QUARTERLY REPORT

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The Quarterly Report provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

HARRY POTTER IN THE PUBLIC SCHOOLS
(Article by Dana L. Long, Legal Counsel)

Harry Potter: Good v. Evil

On the longest day of the year, the longest wait of the year[1] came to an end as millions of children (and adults) lined up at bookstores across the United States and around the world to purchase the fifth installment in the Harry Potter series. On June 21, 2003, *Harry Potter and the Order of the Phoenix*[2] shattered previous publishing records as 5 million copies were sold in the United States in the first 24 hours.[3] Scholastic Corporation, the U.S. publisher of the Harry Potter books, announced on June 24, 2003, that it was going back to press for a third printing, for a total of 9.3 million copies.[4] *Order of the Phoenix* now tops the New York Times' bestseller list for children's chapter books, joining the first four Harry Potter books in the top five positions.[5] The Harry Potter books have had a long run on the bestseller list (as of July 7, 2003): *Harry Potter and the Sorcerer's Stone* (published Sept. 1998) - 180 weeks; *Harry Potter and the Chamber of Secrets* (published June 1999) - 168 weeks; *Harry Potter and the Prisoner of Azkaban* (published Sept. 1999) - 163 weeks; *Harry Potter and the Goblet of Fire* (published July 2000) - 134 weeks; and *Harry Potter and the Order of the Phoenix* (published June 2003) - 2 weeks.[6] Eighty million copies of the first four books have been sold in the United States. Two hundred million copies have been sold worldwide, in 55 languages.[7]

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[1]For many, the wait was nearly three years, as the fourth installment in the series was released on July 8, 2000.

[2]The first four books by J.K. Rowling, all of which continue to be best-sellers, are *Harry Potter and the Sorcerer's Stone, Harry Potter and the Chamber of Secrets*, *Harry Potter and the Prisoner of Azkaban*, and *Harry Potter and the Goblet of Fire*.

[3]The previous record was set by *Harry Potter and the Goblet of Fire*, which broke previous publishing records with a first printing of 3.8 million. Three million copies were sold during the first weekend, necessitating a second printing of an additional three million copies.

[4]"Scholastic Goes Back to Press for a Third Printing of 800,000 Copies of *Harry Potter and the Order of the Phoenix* After Record-Breaking First Day Sales of 5 Million," http://www.scholastic.com/aboutscholastic/news/press_062403.htm.

[5]For many months after their release, the first three books in the series dominated the New York Times' bestseller list for hardcover fiction until the Times created a separate children's list.

[6] http://www.nytimes.com/2003/07/13/books/bestseller/0713bestchildren.html.

[7] "Random Numbers: Mr. Potter" (6/17/2003) http://www.txcn.com/sharedcontent/dallas/breakroom/stories/061703brrandomnumbers.c5278e97.html.

In spite of, or perhaps because of, their widespread popularity, it didn't take long for the Harry Potter books to become the target of conservative Christians[8] who claimed the books promoted witchcraft and the occult, as well as disrespect for authority. Some parents merely prohibited their children from reading the books, but others protested or sought to remove the books from school and public libraries, or at the very least to restrict access to the books. Conversely, many teachers and parents praised these books, which captured the imaginations of children and encouraged them to read. Young elementary school children were now reading lengthy chapter books. *Harry Potter and the Sorcerer's Stone* is 309 pages in length. Each successive book has been longer than its predecessor. *Harry Potter and the Order of the Phoenix* is 870 pages, and Harry Potter fans reportedly can't wait for the next book.

Judy Blume,[9] the author of 22 books, including *Are You There, God? It's Me, Margaret*, and the editor of *Places I Never Meant To Be: Original Stories by Censored Writers*, commented on the criticism of the Harry Potter books in an article appearing in the New York Times on October 22, 1999:

> It's a good thing when children enjoy books, isn't it? Most of us think so. But like many children's books these days, the Harry Potter series has recently come under fire. In Minnesota, Michigan, New York, California and South Carolina, parents who feel the books promote interest in the occult have called for their removal from classrooms and school libraries. . . .
>
> I knew this was coming. The only surprise is that it took so long–as long as it took for the zealots who claim they're protecting children from evil (and evil can be found lurking everywhere these days) to discover that children actually like these books. If children are excited about a book, it must be suspect. . . .

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[8]While most criticisms of the Harry Potter books come from conservative Christians, it is unfair to characterize conservative Christians in general as being opposed to these books. See, for example, the many editorials that appear on the *Christianity Today Magazine* website that are quite favorable to the Harry Potter books: "Why We Like Harry Potter," *Christianity Today Magazine*, http://christianitytoday.com/ct/2000/001/29.37.html, which states that the "series is a *Book of Virtues* with a preadolescent funny bone. Amid the laugh-out-loud scenes are wonderful examples of compassion, loyalty, courage, friendship, and even self-sacrifice."; "Opinion Roundup: Positive About Potter," *Christianity Today Magazine*, http://christianitytoday.com/ct/1999/150/12.0.html.; and "Virtue on a Broomstick," *Christianity Today Magazine*, http://christianitytoday.com/ct/2000/010/37.117.html (by Michael G. Maudlin).

[9]Judy Blume is herself a censored author, with five of her books appearing on the American Library Association's list of the most frequently challenged books of 1990 - 2000: *Forever*; *Blubber*; *Deenie*; *Are You There, God? It's Me, Margaret*; and *Tiger Eyes*. http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Banned_Books_Week/Related_Links7/100_Most_Frequently_Challenged_Books_of_1990-2000.htm.

> My husband and I like to reminisce about how, when we were 9, we read straight through L. Frank Baum's Oz series, books filled with wizards and witches. And you know what those subversive tales taught us? That we loved to read! In those days I used to dream of flying. I may have been small and powerless in real life, but in my imagination I was able to soar.[10]

Although many share the sentiments of Judy Blume, the criticism and protests of the Harry Potter books continue. A number of groups and churches have held book burnings to protest Harry Potter and other books or recordings deemed to be offensive.[11] On the eve of the release of the movie made of the first book, *Harry Potter and the Sorcerer's Stone*, the Jesus Party, in Lewiston, Maine, planned to stage a book burning. The fire department, determining that a book burning was a fire hazard, denied a permit. A book-cutting was held instead. Protesters and counter-protesters argued over the definition of evil. The Jesus Party claimed evil was embodied in the messages in the Harry Potter books. The counter-protesters replied that evil lives in those who want to ban books and censor what men, women, and children can read.[12]

Actual book burnings have been staged elsewhere. While the public library in Alamogordo, New Mexico, displayed the Harry Potter books, the city's Christ Community Church held a book burning of the works of J.K. Rowling. Several hundred members of the congregation attended, and some placed copies of Harry Potter books into the bonfire, as well as J.R.R. Tolkien novels, issues of *Cosmopolitan* and *Young Miss* magazines, AC/DC recordings, *The Complete Works of William Shakespeare*, and ouija boards. About 800 counter-protesters also attended. The counter-protesters responded with generous donations to the library. The library's director stated the money would be used to purchase additional copies of the Harry Potter books and the works of J.R.R. Tolkien and William Shakespeare.[13]

Along with its lengthy appearance on the New York Times' bestseller list, the Harry Potter series has also topped another list from 1999 through 2002–the American Library Association's (ALA) list of the most frequently challenged books. The ALA describes a challenge as an attempt to remove or restrict materials, based upon the objections of a person or group. A challenge is more than a person expressing a point of view; it is an attempt to remove material from the curriculum or library, thereby restricting the access of others. (The ALA notes that there are probably four or five

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[10]Reprinted in *Censorship News Online*, Issue No. 76, "Is Harry Potter Evil?" by Judy Blume, http://ncac.org/cen_news/cn76harrypotter.html.

[11]"Book Burning in the 21th Century," http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Banned_Books_Week/Book_Burning/21st_Century/21st_Century.htm.

[12]"Jesus Party, Opposition Square Off Over Potter Books," http://www.sunjournal.com/story.asp?slg=111601jesus.

[13]"Harry Potter Books Burn as Library Showcases Rowling Titles," http://www.ala.org/cfapps/archive.cfm?path=alonline/news/2002/020107.html.

unreported challenges for every one reported.) And, for the years 2000, 2001, and 2002, J.K. Rowling has been at the top of the ALA's list of the most challenged authors.[14]

Censorship in the School Library

A recent challenge to the Harry Potter series made its way to the federal district court in Arkansas. Counts v. Cedarville School District, 295 F.Supp2d. 996 (W.D.Ark., April 22, 2003). This case began when a parent of a student enrolled in the Cedarville School District and her pastor, Mark Hodges (who was also a member of the school board), became concerned that the Harry Potter books were in circulation in the public school libraries. Upon being advised of the procedure to request the removal of library materials, the mother submitted a Reconsideration Request form, asking that *Harry Potter and the Sorcerer's Stone* be withdrawn from the school libraries. The other three books available at the time were not addressed in the reconsideration request.

Following school procedure, a Library Committee was formed to consider the matter. The Library Committee consisted of 15 members, with five members each from the high school, middle school, and elementary school. Representatives from each school consisted of the principal, librarian, a teacher, a student, and the parent of a student attending the school. After a review of *The Sorcerer's Stone*, the Library Committee voted unanimously to keep the book in circulation without restriction.

The School Board, however, voted 3-2 to restrict access to all four books in the Harry Potter series.[15] The board did not vote to restrict access to the books due to any concerns of profanity, sexuality, obscenity, or perversion in the books. Nor was the board concerned that reading the books had actually caused any disruption. In fact, only one of the three board members voting to restrict the books had even read *The Sorcerer's Stone*, and none of them had read the other three books.

Pursuant to the restriction, the Harry Potter books were to be removed from the library shelves and placed where they would still be visible, but out-of-reach of the students. To check out a Harry Potter book, a student would need signed permission from a parent or legal guardian.

The plaintiffs sued the school district claiming their rights under the First and Fourteenth Amendments were being abridged by the decision of the school board to restrict access of students, including plaintiffs' daughter, to certain books. Plaintiffs' daughter had already read the first three Harry Potter books, owned the fourth, and had the signed permission of her parents to check the books out of the library.

The question presented to the court was: Does a school board's decision–to restrict access to library books only to those with parental permission–infringe upon the First Amendment rights of a student

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[14]http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Banned_Books_Week/Challenged_and_Banned_Books/Challenged_and_Banned_Books.htm#mfcb.

[15]This action was filed in July, 2002. The fifth book in the series, *The Order of the Phoenix*, was not released until June 21, 2003.

who has such permission? Id. at 310-11. The court determined that the stigmatizing effect of requiring parental permission to check out a book constituted a restriction on student access. The fact that a student could not take the books off the shelf and thumb through them without going through the check-out process with parental permission was a further restriction on student access. Unless the restrictions are justified, they would constitute an impermissible infringement of the student's First Amendment rights. Id. at 311. The court quoted from Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969), which stated that while "students do not shed their constitutional rights at the schoolhouse gate, in First Amendment cases the Supreme Court has recognized a very limited restriction where 'necessary to avoid material and substantial interference with schoolwork or discipline.'" 295 F.Supp.2d at 1002.

The three members of the school board voting to restrict access to the Harry Potter books testified by deposition. The reasons for restricting access were that the books might promote disobedience and disrespect for authority, and that the books dealt with witchcraft and the occult. The first board member, who was the only one of the three who had even read one book, testified that he didn't know of any problems caused by the books. The restriction was imposed as a preventative measure. The second board member testified that books which teach that sometimes rules need to be disobeyed should not be in a school library. The third board member thought the books "could" lead to juvenile delinquency. He was not, however, motivated by what the students were doing, but what they might do later. The Court found these concerns speculative as there was no evidence of any actual disobedience or disrespect resulting from reading the Harry Potter books. Id. at 1004. Such speculation as to potential disruption did not show the material and substantial interference with schoolwork or discipline that would justify a limited restriction on students' First Amendment rights as recognized by the Supreme Court in Tinker.

The second reason for restricting access to the books–that the books dealt with witchcraft and the occul –fared no better with the Court. The Court again quoted from Tinker in noting "in our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." 295 F.Supp.2d at 313. The testimony of all three board members indicated a belief that the books promote a particular religion, that of witchcraft. The Court quoted the Supreme Court in Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799 (1982):

> Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, the petitioners have exercised their discretion in violation of the Constitution .... In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

(Internal citation omitted.) 295 F.Supp.2d at 1004

Because the school district cannot constitutionally restrict access to the ideas expressed in the books, and the district failed to justify the restriction by showing actual disruption or interference with schoolwork or discipline, summary judgment was granted in favor of the plaintiffs.

Challenges to Curriculum

The Counts' decision dealt with an attempt to restrict or deny access to books in the school library and to suppress ideas. Such restrictions run afoul of the Free Expression clause of the First Amendment. For further discussion of such censorship see "School Library Censorship: Freedom of Speech," **Quarterly Report** October-December 1996. Challenges to materials used in the public school curriculum, on the other hand, generally encompass objections based upon the Establishment or Free Exercise clauses of the First Amendment. In other words, objections to curricular material tend to make the claim that the materials establish a religion, or interfere with the objector's exercise of his religion, in violation of the First Amendment. See, for example, "Curriculum and Religious Beliefs," **Quarterly Report** July-September 1998; April-June 1998; "Choral Music and the Establishment Clause," **Quarterly Report** April-June 1996; January-March 1998; "Challenges to Curriculum," **Quarterly Report** July-September 1996; "Evolution v. 'Creationism,'" **Quarterly Report** October-December 1996; October-December 1997; October-December 1999; and "Opt-Out Curriculum and Religious Beliefs," **Quarterly Report** January-March 1996.

Challenges to public school reading books during the past thirty years have been attributed to two major causes: methodology (a change in reading methods from rote to phonics to whole language) and content. The changes in content encompassed the inclusion of minorities, different lifestyles and cultures, and women in non-traditional roles.[16] Parents brought challenges to several textbooks on religious grounds: Heath's *Communicating* reading series and Houghton Mifflin's *Interaction* series;[17] Holt, Rinehart and Winston's *The Basic Reading* series;[18] and health and American history textbooks.[19] The circuit courts addressing these challenges consistently found no violation of the Establishment Clause of the First Amendment. These courts distinguished between mere exposure to materials one finds religiously objectionable as opposed to inculcation. The Sixth Circuit Court, in Mozert, quoted from Supreme Court Justice Robert Jackson's concurring opinion in McCollum v. Bd. of Education, 333 U.S. 203, 68 S.Ct. 461 (1948):

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing

[16]"Challenges to Public School Reading Textbooks," 106 *Ed. Law Rep*. 1 (Frances R. A. Patterson), (March 7, 1996).

[17]Williams v. Board of Education of Kanawha County, 530 F.2d 972 (4th Cir. 1975).

[18]Mozert v. Hawkins County Pub. Sch., 765 F.2d 75 (6th Cir. 1985).

[19]Smith v. Board of Sch. Commissioners of Mobile County, 827 F.2d 684 (11th Cir. 1987).

but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

Mozert, 765 F.2d at 1069.

While litigation was pending concerning Holt's *Basic Reading* series, Holt was in the process of publishing its new *Impressions* reading series, which generated additional controversy. Challenges to the *Impressions* reading series were brought on religious grounds alleging the series promoted the religion of Wicca, Satanism and witchcraft. Indeed, the complaints about the *Impression* series are the same as the complaints today about the Harry Potter series.

Fleischfresser v. Directors of School District 200, 15 F.3d 680 (7th Cir. 1994). The parents of elementary students in Kindergarten through Grade five sought to enjoin the school district from continued use of the *Impressions* reading series. The parents maintained the reading series violated both the Establishment and Free Exercise Clauses of the First Amendment. The parents claimed the series focused on wizards, sorcerers, giants and other creatures with supernatural powers. The parents further claimed that use of the *Impressions* series sought to indoctrinate the children in values directly opposed to their Christian beliefs by teaching tricks, despair, deceit and parental disrespect. Id. at 683.

In addressing the parents' claims that the use of the *Impressions* series violated the Establishment Clause of the First Amendment, the Seventh Circuit Court of Appeals utilized the three-pronged Lemon[20] test: to be constitutional, the action must (1) have a secular purpose, (2) have a primary effect that neither advances nor prohibits religion, and (3) not foster excessive entanglement with religion. 403 U.S. at 612-13.

Before applying the Lemon test, however, the Seventh Circuit had to first determine whether there even was an issue of establishment of religion. The Seventh Circuit noted the "religion" the parents claimed was being established was a collection of exercises in "make-believe" designed to develop and encourage the use of the imagination and reading skills in children. The purpose of the *Impressions* reading series was to stimulate a child's senses, imagination, intellect, and emotions. The series included works of C. S. Lewis, A. A. Milne, Dr. Seuss, Ray Bradbury, L. Frank Baum, Maurice Sendak, and others. The challenged works all involved fantasy and make-believe to a significant degree. In determining that such fantasy and make-believe did not establish a religion, the Seventh Circuit stated:

> The parents would have us believe that the inclusion of these works in an elementary school curriculum represents the impermissible establishment of pagan religion. We do not agree. After all, what would become of elementary education, public or private, without works such as these and scores and scores of others that serve to expand the minds of young children and

[20]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971).

> develop their sense of creativity? With that off our chest, we can now properly dispose of the parents' claim within the structure of the Lemon test.

Fleischfresser, 15 F.3d at 688.

The parents did not allege that the purpose of using the *Impressions* reading series was religious. However, the Seventh Circuit found there was a clear secular purpose as public schools traditionally rely on fantasy and make-believe to hold children's attention to develop reading skills and to help to develop a sense of creativity and imagination. Id. In addressing the second prong of the test, the Seventh Circuit noted that "the Establishment Clause is not violated because government action 'happens to coincide or harmonize with the tenets of some or all religions.' (Citations omitted)." Id. at 689. While some stories reflect what the parents believe are religions of Neo-Paganism or Witchcraft, other stories reflect Catholic and Protestant beliefs. The primary effect of the reading series is not to promote or endorse any of these religions, but to improve the reading skills of the children. The Seventh Circuit found no merit to the parents' claim of excessive entanglement merely because a curriculum review committee reviewed the series before it was adopted.

The Seventh Circuit next turned to the parents' claim that the use of the *Impressions* reading series interfered with their free exercise of their religion. This right has been explained by the Supreme Court:

> The Free Exercise Clause recognized the right of every person to choose among types of religious training and observance, free of state compulsion. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222, 83 S.Ct. 1560 (1963). Further, this right includes the right of parents to control the religious upbringing and training of their minor children. Wisconsin v. Yoder, 406 U.S. 205, 230-31, 92 S.Ct. 1526 (1972).

Fleischfresser, 15 F.3d at 689.

The Seventh Circuit analyzed the free exercise claim by balancing the burden placed upon the parents' religion and the government's interest in the use of the *Impressions* reading series. Minimal burden was placed on the parents, as the school district did not preclude the parents from meeting their religious obligations to instruct their children, nor were the parents being compelled to do anything, or refrain from doing anything of a religious nature. Even had there been a substantial burden placed upon the parents, the Seventh Circuit noted that the government's interest in providing a public school education would outweigh the parents' interest. Id. at 690.

Brown v. Woodland Joint Unified School District, 27 F.3d 1373 (9th Cir. 1994). Brown involved another challenge by parents to the *Impressions* reading series, with the Browns contending the series promoted witchcraft. As in Fleischfresser, the Court of Appeals applied the Lemon test to address the parents' claim that the use of *Impressions* violated the Establishment Clause. First, the Browns conceded that the purpose of using the books was secular. Therefore, there was no claimed violation of the first prong of the test. Their main contention was that the use of the reading series violated the second prong of the Lemon test: the use of the reading series had a primary effect of

advancing or disapproving religion–even if not intended. Id. at 1378. The Browns assert that the use of the reading series endorses witchcraft as a few of the suggested activities require the children to pretend they are witches, role-play sorcerers, and cast spells. The Ninth Circuit referred to the Supreme Court's decision in McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1960) in determining that a practice's mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of advancing religion. Brown at 1380. The Court agreed with the Seventh Circuit's conclusion in Fleischfresser and stated:

> It is not disputed that the author-editors of *Impressions* drew upon the folklore of diverse cultures for the charms, spells, wizards and witches used in the Challenged Selections. McGowan and Smith indicate that the coincidence or resemblance of the figures and myths of folklore to the practitioners and practices of witchcraft does not cause state use of such folklore to endorse witchcraft or to cause students to believe reasonably that they are participating in religious ritual.

Brown, 27 F.3d at 1381.

Finally, the Browns claim that the use of the *Impressions* reading series violates the third prong of the Lemon test, fostering excessive entanglement with religion, by generating political divisiveness. The Ninth Circuit determined that the political divisiveness doctrine is generally only applied in cases involving government subsidies to religion, and therefore was not applicable to this case. Id. at 1383.

Harry in the Curriculum?

There have not yet been any reported cases challenging the use of the Harry Potter books in the classroom. But just as Harry Potter is on bookshelves across the country in public and school libraries, as well as in the homes of millions of children and adults, he is also undoubtedly in the classroom. Elementary school teachers read aloud from these books to enhance listening skills, increase vocabulary, encourage critical thinking skills, and encourage children to read. Children read the books as literature and complete assignments and answer questions as to plot and character development, themes, conflicts, and vocabulary.

It is possible that parental objection to the use of the *Harry Potter* books in the public school is sometimes accommodated by allowing the parent to "opt-out" the parent's child from participation. Some objections may result in the quiet removal of the books from the school or from use in the curriculum. Neither course of action on the part of a school district will necessarily protect the school from litigation. A parent who objects to a particular book may not be satisfied with providing alternate instruction to a student, believing that such action stigmatizes the student. Such a parent may insist that no student be permitted access to the book. Conversely, removing a book because one or more parents object may cause others to complain, as occurred in the Counts' case. The ALA

offers suggestions to libraries in handling challenges to materials, and outlines a review policy similar to that used by the school district in Counts.[21]

The Harry Potter stories contain many of the recurring themes and motifs contained in many of the challenged works discussed above: created worlds or imaginary realms; characters that call upon some sort of power for good or evil; and a conflict between opposing forces. The Harry Potter stories all involve a basic conflict between good and evil, and take place in a fantasy world involving the use of magic. Harry Potter continues in the tradition of high fantasy involving the ultimate values of goodness, truth, courage, and wisdom.[22] It is likely that any legal challenges either to Harry Potter remaining on the library shelves in public schools, or appearing in the classroom, will have similar results to the challenges discussed above.

VOUCHERS AND THE ESTABLISHMENT CLAUSE: THE "INDIRECT BENEFIT" ANALYSIS

The relationship between religious expression and public schools remains an uneasy one at best. U.S. Secretary of Education Rod Paige has been criticized by such groups as the Americans United for Separation of Church and State and the American Federation of Teachers for comments he made recently to the Baptist Press, the news service of the Southern Baptist Convention, indicating his preference for Christian values in education. The remarks that drew criticism were "All things equal, I would prefer to have a child in a school that has a strong appreciation for the values of the Christian community, where a child is taught to have a strong faith."[23]

Americans United for Separation of Church and State, in a mass mailing to Chief State School Officers on April 7, 2003, criticized the "Guidance on Constitutionally Permitted Prayer in Public Elementary and Secondary Schools" issued February 7, 2003, by Secretary Paige and the United States Department of Education (USDOE) pursuant to Sec. 9524 of the No Child Left Behind Act of 2001 (see 20 U.S.C. § 7904 for statutory provision).[24] Americans United cited "four problem areas" with the "Guidance," challenging the right of teachers to participate in religious activities on school grounds, the possibility that some forms of "student-initiated"

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[21]"Conducting a Challenge Hearing" http://www.ala.org/Template.cfm?Section=Dealing_with_Challenges&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11087.

[22]"Harry Potter, Wizards, and Muggles: The First Amendment and the Reading Curriculum," 173 *Ed. Law Rep.* 363, 365 (Todd A. DeMitchell and John J. Carney), (March 27, 2003).

[23]See "Paige's Remarks on Religion in Schools Decried," *Washington Post*, Wednesday, April 9, 2003, p. A06 (Alan Cooperman).

[24]See www.ed.gov/inits/religionandschools/prayer_guidance.html.

prayer might be legal during graduation ceremonies or other school events, the implication that public school students have the right to incorporate religious material into classroom presentations,[25] and the implied threat that public schools that do not comply with the *Guidance* will lose their federal funds. Americans United also provided its own five-page analysis of the *Guidance* apart from its four areas of criticism.

While this sparring is likely to go on, the issue of vouchers that provide indirect aid to religiously affiliated schools has been resolved, for the time being, at the federal level. This does not necessarily resolve such issues at the state level.

Federal Establishment Clause Analysis

Prior to 2002, the U.S. Supreme Court addressed in three (3) separate cases the Establishment Clause[26] challenges to ostensibly neutral, government-sponsored programs that provided aid directly to a broad class of individuals who, in turn, directed the funds to religious schools or institutions of their own choosing.

Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062 (1983) was the first of these cases. Mueller involved a Minnesota program that authorized tax deductions for various educational expenses, including private school tuition costs. The majority of the program's beneficiaries were parents who had placed their children in private, religiously affiliated schools. The Supreme Court, in rejecting an Establishment Clause challenge to the program, noted the class of beneficiaries included "*all* parents" (emphasis original) and that elections to use the program benefits was effected by "the principle of private choice" and not by direct aid. Any benefit to religiously affiliated public schools occurred "only as a result of numerous, private choices of individual parents of school-age children." 463 U.S. at 399-400. No benefit was conferred on any particular religion or on religion generally, the Court held. The program was one of "true private choice" that lacked any evidence the State deliberately created incentives to benefit religiously affiliated schools.

In Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S. Ct. 748 (1986), the second of such cases, the Supreme Court determined a vocational scholarship program that was available to eligible students without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions chosen by such students did not run afoul of the Establishment Clause. Witters was an eligible recipient of the vocational scholarship. He

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[25]Indiana does address this somewhat by statute. See I.C. § 20-10.1-4-2.5(e), which requires a public school district to allow a student to include certain religious references in a report or other "work product," and further prohibits a school from punishing the student for doing so, including reducing the student's grade.

[26]The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" and "effect" of advancing or inhibiting religion.

wanted to study at a religiously affiliated institution to become a pastor. "Any aid...that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of the aid recipients." 474 U.S. at 487. A majority of the court also stressed that the amount of government aid that may find its way to religiously affiliated institutions was not relevant to the constitutional analysis. 474 U.S. at 490-91.

Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S. Ct. 2462 (1993) was the third such case. This one involved the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and whether this federal program permitted sign-language interpreters to assist a deaf child enrolled in a parochial school. The Supreme Court found the federal program provided benefits to a broad class of citizens who are defined without regard to any religious affiliation. The primary beneficiaries of IDEA are children with disabilities and not religiously affiliated schools. 509 U.S at 12. "By according parents freedom to select a school of their choice, the [IDEA] statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." 509 U.S. at 10. The court stressed that its decision was based on neutrality of the program and the principle of private choice. The number of program beneficiaries attending religiously affiliated schools was not a legitimate consideration. 509 U.S. at 10-11.

In all three cases, the private choice of a broad class of beneficiaries was the intervening party, interrupting any unconstitutional nexus between government and religion.

In 2002, the Supreme Court visited the issue again, but in a case with considerable more interest and potential repercussions. In Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460 (2002), the court reversed the 6th Circuit Court of Appeals, which had found Ohio's Pilot Project Scholarship Program unconstitutional because it violated the Establishment Clause. The Supreme Court noted the affected school district (Cleveland City School District) was in considerable distress. A federal district court had placed it under state control, while the State Auditor found the school district had failed on all 18 performance standards considered necessary for minimal acceptable performance. Only ten percent of ninth grade students could pass a basic proficiency test; two-thirds of all high school students did not graduate. Of those who did graduate, their overall academic performance was markedly inferior to their counterparts in other public school districts. 122 S. Ct. at 2463.

The Ohio legislature enacted the Pilot Project Scholarship Program to create more educational choices for students and parents in the Cleveland district. A part of the program provided tuition assistance for students to attend participating public and private schools, while another part of the program provided tutorial assistance for students who chose to remain in the Cleveland schools.

Most of the private schools that participated in the program are religiously affiliated. However, most of the private schools in the Cleveland area are parochial. The parent of a child who chose to attend a private school, including a parochial school, would be responsible for some amount of co-pay, based on income factors. There was more incentive for existing public schools to

recruit such students, but none of the surrounding public school districts elected to enroll any of the Cleveland students. Community schools (Ohio's denomination for "Charter Schools") and magnet schools developed within the Cleveland district received considerably more state support.

Tuition aid is distributed to parents by the State Superintendent according to financial need. "Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school." 122 S. Ct. 2464. The private school program is only a part of a "broader undertaking by the State to enhance the educational options of Cleveland's school children in response to the 1995 takeover." Id. The court had no problem finding the Ohio program satisfied the "purpose" prong of the Establishment Clause.

> There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

122 S. Ct. at 2465. Citing to Mueller, Witters, and Zobrest, the court reiterated its past jurisprudence on indirect aid programs.

> [These cases] ... make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

122 S. Ct. at 2467. The Ohio program, the majority found, was "a program of true private choice," and, as a consequence, constitutional. The program is "neutral in all respects toward religion"; it is only part of a number of strategies being employed to assist the beleaguered school district; it conferred assistance "to a broad class of individuals defined without reference to religion" but with reference to being the parent of a child in the Cleveland school district; the program included potentially all schools, public and private, in the area; program benefits were made available to participating families on neutral terms with no reference to religion; and there were no financial incentives that directed or channeled families to chose parochial schools. 122 S. Ct. at 2467-68.

> The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools [because of the potential co-pay share of tuition costs].

122 S. Ct. at 2468 (emphasis original). The court also rejected the argument that the program would create a "public perception" that the State was endorsing religious practices and beliefs.

> [W]e have repeatedly recognized that no reasonable observer [aware of the history and context of the program] would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.

122 S. Ct. at 2468-69 (emphasis original). An objective, informed observer "would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general." 122 S. Ct. at 2469.

The Story Goes On . . .

There were strong-worded dissents to the majority opinion in Zellman. The dissenters may not have to wait long to revisit the issue. On May 19, 2003, the Supreme Court granted certiorari in Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), another Washington case similar to Witters, *supra*. Locke v. Davey, 123 S. Ct. 2075 (2003). However, Davey does not involve the Establishment Clause; rather, it is brought primarily under the Free Exercise Clause of the First Amendment.[27]

Davey involves a state-funded "Promise Scholarship" program designed to provide post-secondary assistance to students who qualify. Qualifications are based on high school grades, family income, and attendance at an accredited college in the State of Washington. The scholarship need not go to tuition costs but can go for any education-related expense, including room and board. Davey qualified for the scholarship but lost it when he chose to major in Pastoral Ministries at Northwest College. Northwest College is an accredited school but it is affiliated with a religious denomination. It teaches theology from a Bible-based Christian perspective rather than from a historical or scholarly one. Although the scholarship program is neutral towards religion, the state agency that administers the program determined that Davey's intended use of the scholarship would violate Washington's constitutional provision, which is

[27]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

more restrictive than the federal counterpart.[28] The purpose of the program is broad: to provide some financial assistance to outstanding students who qualify for the scholarship. However, administration of the program is not "viewpoint neutral" because "state policy excludes only those recipients who pursue the study of theology from a religious perspective" but apparently not from pursuing the study of theology from a scholarly or historical perspective. 299 F. 3d at 752-53. The statute creating the program has a neutral purpose and is based on objective criteria.

> The selection criteria are high school grades, income, and staying in Washington for college; the *de* selection criterion is pursing a degree in theology. This has nothing to do with the purpose or point of the program. To the extent that the message behind the Promise Scholarship is that doing well in high school pays off, and that going to college in Washington is a good thing, and that developing the talents of promising students is of great importance to the state, it is qualified with the message "unless the student pursues a degree in theology from a religious perspective." This necessarily communicates disfavor, and discriminates in distributing the subsidy in such a way as to suppress a religious point of view.

Id. at 756 (emphasis original). The court concluded "that in this case, there *is* a free exercise problem." Id. at 759 (emphasis original). The State's interest was not compelling. The scholarship program is secular, and it rewards superior achievement by high school students who satisfy certain objective criteria. No funds go directly to any sectarian school or for non-secular study "unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major." Id. at 760, citing Zelman. In fact, the court added, "[t]he proceeds...may be used for any education-related expense, including food and housing; application to religious instruction is remote at best." Id. The court found, 2-1, that the agency's denial of the scholarship to an otherwise qualified student based solely upon his choosing a major in theology taught from a religious perspective infringed upon his right to the free exercise of his religion.

State Analyses More Difficult

Federal analysis addresses a static phrasing and, therefore, will be more consistent. This is more difficult where individual State constitutional provisions are at issue. The language can vary widely. In Witters, *supra*, the Supreme Court found the Washington vocational scholarship program did not run afoul of the Establishment Clause. But this was a federal analysis. The Supreme Court remanded to the Washington Supreme Court for its review as to whether Witters' intention to use the vocational scholarship to study at a religiously affiliated institution so as to become a pastor would be contrary to Washington's constitution. The Washington Supreme

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[28]Art. I, § 11 of Washington's Constitution reads in relevant part: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment..."

Court found that extending aid would violate the State's constitutional prohibitions on appropriating and applying public funds to religious instruction and would not infringe upon the applicant's right to the free exercise of religion.[29] Witters v. State Commission for the Blind, 771 P.2d 1119 (1989), on remand from Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S. Ct. 748 (1986).[30]

The first major State constitutional case was Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998), *cert. den.*, 525 U.S. 997, 119 S. Ct. 467 (1998).[31] The Jackson case involved the Milwaukee Parental Choice Program (MPCP), which created opportunities for parents to send their children to private schools, most of which were sectarian, but the public funds provided would have to be restrictively endorsed to the private school. The Wisconsin Supreme Court found the program had a secular purpose (provide low-income parents with an opportunity to have their children educated outside the Milwaukee Public School system), which, like the Cleveland district in Zelman (but not to the same degree), was in distress. The criteria for participation were neutral, neither favoring or disfavoring sectarian schools. The decision to attend a sectarian school came about "only as a result of the numerous private choices of the individual parents of school-age children." 578 N.W.2d at 617. The MPCP satisfied both the Establishment Clause and Wisconsin's constitution. On the latter matter, the court found the program did not violate Wisconsin's "compelled support clause" because no student was required to attend a sectarian school. In addition, the sectarian schools cannot compel students attending there pursuant to the MPCP to attend religious services (an "opt out" provision in the program).[32]

Wisconsin's Constitution is composed of four (4) clauses that may be described as the "right to worship clause," "compelled support clause," "freedom of conscience clause," and the "benefits

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[29]This latter determination was not made by the U.S. Supreme Court when it decided Witters but it is the core issue in Davey. Should the Supreme Court uphold the 9th Circuit's decision in Davey, then the Free Exercise Clause could require a State to extend aid regardless of the language in the State's constitution.

[30]Many State laws were affected by the late-19th century Blaine Amendment, which was part of an anti-Catholic movement that "has a shameful pedigree that we do not hesitate to disavow," according to the U.S. Supreme Court in Mitchell v. Helms, 530 U.S. 793, 828-29, 120 S. Ct. 2530 (2000). "Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.' See generally Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992)." Id.

[31]See "Vouchers and Parochial Schools," **Quarterly Report** April-June 1998.

[32]See "School Voucher Issues: Milwaukee Parental Choice Program," **Quarterly Report** April-June 1996.

clause." The following is a comparison chart of constitutional provisions from Wisconsin, Ohio, and Indiana.

Wisconsin *Art. I, § 18*	**Indiana**	**Ohio** *Art. I, § 7*
The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed;	All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences. (*Art. I*, § 2, "Natural Right to Worship")	All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience.
nor shall any person be compelled to attend, erect, or support any place of worship, or to maintain any ministry, without consent;	No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry against his consent. (*Art. I, §4*, "Freedom of Religion")	No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent;
nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship;	No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions or interfere with the rights of conscience. (*Art. I,*§3*,* "Freedom of Religious Opinions and Rights of Conscience")	nor shall any interference with the rights of conscience be permitted....
nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.	No money shall be drawn from the treasury, for the benefit of any religious or theological institution. (*Art. I, §6*, "Public money for Benefit of Religious or Theological Institutions")	[B]ut no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state. (*Art. I, §2*, "School Funds")

Although Indiana has not had a voucher program like Wisconsin and Ohio, it is presently involved in a dispute over the meaning and extent of "benefit" in Art. I, § 6. In Embry *et al.* v. O'Bannon *et al.*, the plaintiffs objected to the State providing *pro rata* funding to public schools

for so-called "dual enrolled" pupils. These students are enrolled primarily in private schools, most of which are parochial. However, they are also enrolled in their local public schools where they participate in curricular subjects not provided at their private schools. The Marion County Circuit Court granted summary judgment on November 28, 2001, to the State defendants, finding the plaintiffs did not have standing as taxpayers to challenge the constitutionality of public education expenditures. The Circuit Court also noted the plaintiffs appeared to be challenging local school district agreements with private schools rather than the State's funding procedures. Rather than concluding his decision based on the lack of standing, the court also addressed the substantive issues raised by the plaintiffs, finding the State funding policies are neutral toward religion because the public schools–not the private schools–receive state tuition support based on the amount of public school instruction they receive. Prohibiting children enrolled in parochial schools from also being enrolled in their public schools raises other constitutional problems, including the requirement under Indiana's constitution that its public schools be open to all. *Art. 8, §1*.

The trial court also rejected a challenge that providing internet service constituted a proscribed "benefit" to a religious institution.

> The fact that the public school corporation supplies Internet access in a parochial school in connection with teaching secular subjects to public school students does not prove that public schools provide any benefit to the parochial school. The Internet is a teaching tool for use by public school students, just as are textbooks, sports equipment, art supplies, and overhead projectors.

Slip Opinion at 14, Conclusion of Law No. 55. The court added that it does not violate Indiana's constitution when public school teachers provide secular instruction in parochial school buildings. The court also rejected the application of a rigid "incidental benefit" proscription.

> Under Plaintiffs' theory that the public school curriculum provides a "benefit" to the parochial schools because it makes the parochial schools more desirable than they would be without that curriculum, police and fire protection would also be a "benefit" to the parochial schools because, without them, parochial schools would be less desirable. In other words, neither a public school education nor police and fire protection can be considered as a "benefit" to a parochial school under Article 1, Section 6 of the Indiana Constitution because the parochial school children are entitled to the public school education and the parochial schools themselves are entitled to police and fire protection.

Id. at 15-16, Conclusion of Law No. 63. "The public school funds," the court concluded, "are distributed to and for the benefit of the public school corporations, not the parochial schools."

On appeal, the Indiana Court of Appeals affirmed. Embry *et al. v.* O'Bannon *et al.*, 770 N.E.2d 943 (Ind. App. 2002), finding the plaintiffs lacked standing as taxpayers because they suffered

no direct injury. The appellate court did not analyze the case further. The plaintiffs have sought transfer to the Indiana Supreme Court, which is presently pending.

Faith-Based Initiatives In Other Publicly Funded Programs

Of far more consequence than these continuing and continual spats may be the effect of the Bush Administration's initiatives to include more "faith based organizations" in the federal grant process.

President Bush established the White House Office of Faith-Based and Community Initiatives (OFBCI) on January 29, 2001. See Executive Order No. 13199, **Federal Register**, Vol. 66, No. 21, p. 8499 (January 29, 2001). The Executive Order stated that "Government cannot be replaced by such [faith-based] organizations, but it can and should welcome them as partners. The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty. This delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality." The OFBCI was charged with the "lead responsibility in the executive branch to establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law."[33]

"To the extent permitted by law" is the operative phrase.

Freedom from Religion Foundation v. McCallum, Inc., 324 F.3d 880 (7th Cir. 2003) is the most recent decision involving such initiatives. Decided on April 2, 2003, Freedom from Religion Foundation v. McCallum was a taxpayer suit attempting to enjoin the State of Wisconsin from funding a halfway house called Faith Works, which incorporates Christianity into its treatment program. In upholding the constitutionality of the program, the 7th Circuit relied upon Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460 (2002), the Cleveland, Ohio, school voucher dispute discussed *supra*.

Under the Wisconsin program, a convicted criminal who violates the terms of his parole or probation is, where appropriate, offered enrollment in a halfway house in lieu of returning to prison. One of the choices is Faith Works, which offers a much longer program than secular halfway houses but does encourage offenders to seek a personal relationship with Jesus Christ. Parole Officers have recommended Faith Works to offenders, but the offender is free to choose. The court noted there was no evidence that a parole officer would be influenced by his own religious beliefs in recommending Faith Works. "His end is secular, the rehabilitation of a

[33]President Bush elaborated on this initiative in a recent Executive Order, "Equal Protection of the Laws for Faith-Based and Community Organizations," Executive Order No. 13279, **Federal Register**, Vol. 67, No. 241, p. 77141 (December 12, 2002).

criminal, though the means include religion when the offender chooses Faith Works." 324 F.3d at 882. The offender cannot be forced to accept Faith Works. "The choice must be private, to provide insulating material between government and religion. It *is* private; it is the offender's choice." Id., emphasis original.

In affirming the district court's dismissal of the suit against Wisconsin officials, the 7th Circuit observed:

> A city does not violate the establishment clause by giving parents vouchers that they can use to purchase private school education for their children, even if most of the private schools in the city are parochial schools–provided, of course, that the parents are not required to use the vouchers for a parochial school rather than for a secular private school. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2467-70 (2002). The practice challenged in the present case is similar. The state in effect gives eligible offenders "vouchers" that they can use to purchase a place in a halfway house, whether the halfway house is "parochial" or secular. We have put "vouchers" in scare quotes because the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers.

Id. The court rejected the plaintiffs' argument that the practice of parole officers recommending Faith Works to some offenders was, in effect, providing governmental support to religion.

> The implications of the argument are unacceptable. If recommending a religious institution constituted an establishment of religion, a public school guidance counselor could not recommend that a student apply to a Catholic college even if the counselor thought that the particular college would be the best choice for the particular student.... Suggestion is not a synonym for coercion.

Id., at 883. The court then noted an actual problem: the lack of objective criteria for rating halfway houses, which would mean that any recommendation of Faith Works by a parole officer would likely be based on religious preferences. This is a danger, the court agreed, but the district court did not find evidence that such was occurring. This was not a clearly erroneous finding. Besides, there is evidence from such programs as Alcoholics Anonymous that, for some people, "religion is an effective treatment..." Id., at 884.

> To exclude Faith Works from this competition on the basis of a speculative fear that parole or probation officers might recommend its program because of their own Christian faith would involve the sacrifice of a real good to avoid a conjectured bad. It would be perverse if the Constitution required this result.

Id. "It is a misunderstanding of freedom (another paradox, given the name of the principal plaintiff) to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him. It would mean that a person was not exercising his free will when in response to the question whether he preferred vanilla or chocolate ice cream, he said vanilla, because it was the only honest answer that he could have given and therefore 'he had no choice.'" Id.

The decision is heavily based upon school voucher arguments, including those that originally arose during disputes surrounding the highly contentious Milwaukee Parental Choice Program (MPCP). See Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998), *cert. den.*, 525 U.S. 997, 119 S. Ct. 467 (1998), discussed *supra*. It is ironic that the instant dispute also arose in Milwaukee. There are implications for public schools, especially small or rural schools faced with creating enrollment options under various provisions of the No Child Left Behind Act of 2001 (NCLBA) but lacking sufficient public school options. Similar faith-based options may be in the offing, either by parental choice or by school's offering of various choices, public and private.

PEER SEXUAL ORIENTATION HARASSMENT

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) was the first important case involving this issue. Nabozny attended middle school and high school in Wisconsin. Throughout this experience, he was continually harassed and physically abused by fellow students because of his homosexuality. He repeatedly asked school officials to protect him and punish his assailants, but they failed to do so, even though the school district had a policy of investigating and punishing student-on-student battery and sexual harassment. There was some evidence that "some of the administrators themselves mocked Nabozny's predicament." 92 F.3d at 449.

The assaults and harassment began in middle school, where classmates regularly called him "faggot" and would strike him or spit on him. A school official did intercede and ordered the offending students to cease. Two of them were placed in detention. The harassment ended, but only briefly. After winter break, Nabozny suffered worse harassment, especially at the hands of two classmates. Although Nabozny complained to school administration, the harassment only intensified, culminating in a "mock rape" in a science class by the two classmates while twenty other students looked on and laughed. He escaped to the principal's office.

> [The principal's] alleged response was somewhat astonishing; she said that "boys will be boys" and told Nabozny that if he was "going to be so openly gay," he should "expect" such behavior from his fellow students. In the wake of [the principal's] comments, Nabozny ran home. The next day Nabozny was forced to speak with a counselor, not because he was subjected to a mock rape in a classroom, but because he left the school without obtaining the proper permission. No action was taken against the students involved. Nabozny was forced to return to his regular schedule. Understandably, Nabozny was "petrified" to attend school; he was subjected to abuse throughout the duration of the school year.

Id., at 451. In eighth grade, he was physically assaulted in a bathroom by several other boys. Nabozny and his parents met with the principal, but no action was taken against his assailants. The principal again told Nabozny that he should expect such incidents because he is "openly" gay. This pattern continued throughout the year: Nabozny would be attacked, the principal would promise to do something about it, but nothing would occur. Nabozny eventually attempted suicide. After a stay at a hospital, he completed his eighth grade year in a nonpublic school. Id., at 451-52.

When Nabozny entered the public high school the following year, the harassment continued. He was physically assaulted in the restroom. One boy–who had been one of Nabozny's tormenters in middle school–urinated on him while he was on the bathroom floor. The incident was reported to the principal. Rather than address the incident, the school changed Nabozny's class schedule and placed him in special education classes. The two students who assaulted him in the restroom were also in special education classes. The harassment continued until Nabozny again attempted suicide. He later ran away from home.

During his sophomore year, the harassment continued, both on the school bus and in the school. A school guidance counselor lobbied for administration to take more aggressive action to remedy the harassment but to no avail. Nabozny was viciously attacked in the hallway near the library by eight boys, led by one of the boys who attacked him in the restroom during his freshman year. He was kicked in the stomach for five to ten minutes while the other boys laughed. When the principal was informed of the incident, he reportedly "laughed and told Nabozny that Nabozny deserved such treatment because he is gay." Id., at 452. A few weeks later, Nabozny collapsed from internal bleeding that resulted from the beating in the hallway. Nothing was done to the students who attacked him. He withdrew from school and enrolled in a school in another state.
He was diagnosed as suffering from Post-Traumatic Stress Disorder.

Nabozny eventually filed suit under 42 U.S.C. § 1983 against the school district and several of its officials, alleging violation of his Fourteenth Amendment rights to equal protection and due process. The school defendants moved for summary judgment, which the federal district court granted. The 7th Circuit Court of Appeals affirmed the district court's decision in part and reversed in part.

Wisconsin, by statute, forbids discrimination in its schools, including discrimination based on "sexual orientation." Id., at 453. The school district's policies mirror the statutory requirement, prohibiting discrimination against students on the basis of gender or sexual orientation. Id. The Equal Protection Clause of the Fourteenth Amendment grants to all "the right to be free from invidious discrimination in statutory classifications and other governmental activity." Id., citing Harris v. McRae, 448 U.S. 297, 322, 100 S. Ct. 2671, 2691 (1980). Where a state actor "turns a blind eye" to the requirements of equal protection, an aggrieved party can seek relief pursuant to § 1983. An equal protection violation requires a showing of intentional or purposeful discrimination. A "discriminatory purpose" is more than an active involvement. "It implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of

action at least in part for the purpose of causing its adverse effects on the identifiable group." Id., at 454 (citation omitted).

> A showing that the defendants were negligent will not suffice. Nabozny must show that the defendants acted either intentionally or with deliberate indifference. [Citations omitted.] To escape liability, the defendants either must prove that they did not discriminate against Nabozny, or at a bare minimum, the defendants' discriminatory conduct must satisfy one of two well established standards of review: heightened scrutiny in the case of gender discrimination, or rational basis in the case of sexual orientation.

Id. Although the district court did not believe Nabozny had satisfied his burden of proof with regard to the alleged failure of the school district to provide him equal protection both because of his gender and his sexual orientation, the 7th Circuit found otherwise. Although the school district represented it had a commendable record of enforcing its anti-harassment policy, Nabozny's evidence suggests "they made an exception to their normal practice in Nabozny's case." Id. The school acted upon male-on-female allegations of harassment, but Nabozny's evidence, in conjunction with the school's representations, suggests the school treated male and female victims differently.

The Equal Protection Clause does not require a school to provide everyone with identical treatment. However, a school is to treat each person "with equal regard, as having equal worth, regardless of his or her status." Id., at 456. The school district's argument that there was no clear duty under the Equal Protection Clause for the individual school defendants to enforce every student complaint of harassment and, as a consequence, they are entitled to qualified immunity will fail.

> The question is not whether they are required to treat every harassment complaint the same way; as we have noted, they are not. The question is whether they are required to given male and female students equivalent levels of protection; they are, absent an important government objective, and the law clearly said so prior to Nabozny's years in middle school.

Id. The 7th Circuit also rejected the school's arguments that there should be qualified immunity because there is no prior case directly on point with facts identical to this dispute.

> Under the doctrine of qualified immunity, liability is not predicated upon the existence of a prior case that is directly on point. [Citation omitted.] The question is whether a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful. We believe that reasonable persons standing in the defendants' shoes at the time would have reached such a conclusion.

Id. The 7th Circuit also found that Nabozny provided sufficient evidence to demonstrate that the school defendants treated him differently, and that such discriminatory treatment was motivated by their disapproval of his sexual orientation, "including statements by the defendants that Nabozny should expect to be harassed because he is gay." Id., at 457. The legal question is whether the school defendants are entitled to qualified immunity on his allegation that they failed to provide equal protection based on his sexual orientation.

> Our discussion of equal protection analysis thus far has revealed a well established principle: the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination. There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society... [T]he Wisconsin statute expressly prohibits discrimination on the basis of sexual orientation. Obviously that language was included because the Wisconsin legislature both recognized that homosexuals are discriminated against, and sought to prohibit such discrimination in Wisconsin schools. The defendants stipulate that they knew about the Wisconsin law, and enforce it to protect homosexuals. Therefore, it appears that the defendants concede that they knew that homosexuals are a definable minority and treated them as such.[34]

Id. Alleged discrimination on the basis of sexual orientation is subject to a rational basis review, where the school district's actions would not constitute a constitutional violation if there are any conceivable, reasonable facts that would provide a rational basis for their actions. "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one." Id., at 458. "[W]e hold that reasonable persons in the defendants' positions [during this time period] would have concluded that discrimination against Nabozny based on his sexual orientation was unconstitutional." Id.

The 7th Circuit was less receptive to Nabozny's due process claims. Absent a "special relationship," a state actor has no duty to protect a potential victim. DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989). Local school administrators have no affirmative substantive due process duty to protect students. J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990). Nabozny argues that the school defendants, by failing to punish his assailants, created a risk of harm to him or at least exacerbated the existing risk. Although the school defendants' failure to act "left Nabozny in a position of danger," there is nothing to suggest "that their failure to act placed him in the danger, or increased the pre-existing threat of harm." The school defendants did not increase the risk of harm to Nabozny "beyond that which he would have faced had the defendants taken no action." Id., at 460.

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[34]The 7th Circuit added that the constitutionality of the defendants' conduct is not based on the existence of a state statute. "The fact that the conduct in question is illegal under the statute neither adds to, nor subtracts from, the conduct's constitutional permissibility." Id., at 457, *n*. 11.

Nabozny also argued the school defendants acted with "deliberate indifference in maintaining a policy or practice of failing to punish his assailants, thereby encouraging a harmful environment." Id. The 7th Circuit rejected his argument because it is based on "a failure to act," and the school defendants "had no duty to act." Id. The 7th Circuit reinstated the claims the school defendants failed to provide him equal protection based on his gender and his sexual orientation, but rejected his due process claims because there was insufficient evidence to show the school defendants either enhanced the risk of harm to Nabozny or encouraged a climate to flourish in which he suffered harm. Id., at 461.

Two recent California cases relied upon Nabozny in reaching similar conclusions. However, the California courts also had the benefit of guidance from the U.S. Supreme Court, which created a two-pronged inquiry for analyzing (1) whether a constitutional right even existed based on the facts alleged; and (2) if so, whether such a constitutional right was "clearly established." In Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001), the Court wrote:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the [defendant's] conduct was unlawful in the circumstances of the case.

533 U.S. at 201.

1. Flores *et al.*v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003). This case involved a number of former students who experienced harassment because they were gay, lesbian, or bisexual, or were perceived to be. The students complained of student-to-student anti-homosexual harassment, but school officials allegedly failed to respond to these complaints or responded in an inadequate manner. They claimed a denial of equal protection. The school defendants moved for summary judgment, which was eventually denied by the federal district court.[35] The defendants appealed, claiming they are entitled to immunity because they did not act with improper motive such that a constitutional violation occurred. They also argued they were entitled to qualified immunity because the law was not clearly established that the Equal Protection Clause of the Fourteenth Amendment entitled the students to protection from peer sexual orientation harassment. The 9th Circuit Court of Appeals disagreed with the defendants. The recitation of facts are not nearly as egregious as those in Nabozny. The students experienced name-calling, anti-gay remarks, vandalism to school lockers, physical abuse, and other denigrating activities (placing pornography in lockers, throwing food at the

[35]There were other legal maneuverings in this matter, including remand from the 9th Circuit Court of Appeals to the district court, but these occurrences are not germane.

students, intimidation). School officials responded either not at all or inadequately. In one situation, a student complained of vandalism and offensive remarks concerning her sexual orientation. The school official's response was to ask her if she were gay (she wasn't), and then to ask her not to "bring me this trash any more," referring to pornography other students were placing in the student's locker. Rumors were circulated regarding two students. It appears the rumors were spread in part by a school employee. One student was ostracized in a weight-training class because of the rumors. One student was physically attacked by six other students, sustaining severely bruised ribs. Only one of the six students received any discipline, and it was the victim who was transferred to another school.

The students brought suit under Title IX and 42 U.S.C. § 1983, as well as state law. The district court found–and the 9th Circuit agreed–that the school defendants were not entitled to qualified immunity. The defendants appeared to have treated the students' complaints differently from other types of harassment complaints, even though they had the affirmative duty to enforce the school district's disciplinary, anti-harassment, and anti-discrimination policies to prevent physical and emotional harm to the students. 324 F.3d at 1135. An unconstitutional motive involves both intentional discrimination or "deliberate indifference," the latter based upon situations where there is known peer harassment but the manner of response is "clearly unreasonable." Id., citing Davis v. Monroe County Bd. of Education, 526 U.S. 629, 649, 119 S. Ct. 1661 (1999) and Nabozny. There is sufficient information presented where a jury could reasonably conclude the school defendants engaged in intentional discrimination and acted with deliberate indifference.

The 9th Circuit also rejected the school defendants' claims that the law was not clearly established that there was a duty to protect students from peer sexual orientation harassment at the time of the offending occurrences. As in Nabozny, the school defendants argued that there was no reported case in the 9th Circuit that had materially similar facts such that a school official would be put on notice of the duty. The court found that there was sufficient pre-existing law that would have provided the defendants with "fair warning" that their conduct was unlawful, and that there is no requirement existing case law have "materially similar facts" or that there be a specifically stated statute to this effect. The court cited with favor the Nabozny finding that "school administrators are not immune from an equal protection claim involving peer sexual orientation harassment." Id., at 1137.

> The defendants argue that even if the right was clearly established, no prior case defined the scope of a school administrator's duty to investigate or remedy peer sexual orientation harassment. The guarantee of equal protection, however, does not itself prescribe specific duties. It requires the defendants to enforce District polices in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students. [Citations

> omitted.] Here, it is alleged that the defendants discriminated in the enforcement of school policies that required investigation and remedy of student harassment. The constitutional violation lies in the discriminatory enforcement of the policies, not in the violation of the school policies themselves.

Id., at 1137-38. The court also disagreed that the school defendants' actions could be construed as ineffective, which would not amount to "deliberate indifference." The actions by the school defendants, however, were not just ineffective; they "took no more than the minimal amount of action in response to the complaints of harassment." Id., at 1138. A jury could conclude the minimal response constituted "deliberate indifference." The school defendants, the court added, "do not advance any reason to justify the alleged differential enforcement of District policies. Here, as in *Nabozny* [92 F.3d at 458], "[w]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one." Id.

2. Massey v. Banning Unified School District, 256 F.Supp.2d 1090 (C. D. Cal. 2003). Massey was actually decided shortly before Flores, *supra*, so the federal district court did not have the advantage of the 9th Circuit's guidance. Nevertheless, the district court reached the same conclusion. Massey was an eighth grade student in the local middle school. Following a physical education class, a classmate asked Massey whether she was a lesbian. Massey indicated that she was. That evening, Massey's mother received a telephone call from the physical education teacher indicating that Massey's presence in the locker room made the other students uncomfortable. The teacher acknowledged Massey had not made any inappropriate sexual comments, engaged in any inappropriate sexual conduct, or otherwise acted inappropriately. The following day, the teacher told Massey she could no longer participate in the physical education class and told her to report to the principal's office. For the next week and one-half, Massey sat in the principal's office during the physical education class. No one talked to her nor did anyone advise her mother that she had been excluded from the class. Massey was humiliated by the experience and felt she was being punished because of her sexual orientation. She withdrew from the school and initiated the instant suit.

The school defendants moved to dismiss the complaint, alleging in part that her claims against them are barred by the Eleventh Amendment (sovereign immunity) or they are entitled to qualified immunity. The court disagreed, noting that the Eleventh Amendment would prevent damages from being assessed against the school defendants in their official capacities but would not protect the school defendants in their individual capacities, which is how they have been sued. A suit against an official in his personal capacity can be executed only against the official's personal assets. 256 F. Supp. 2d at 1093, citing Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099 (1985).

The court also rejected the school defendants' claim they were entitled to qualified immunity. The Massey court, as did the Flores court, applied the two-prong test from

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001) to analyze the claim of qualified immunity. The first prong was satisfied in that the school defendants denied Massey equal protection (Fourteenth Amendment) when they prohibited her from participating in the physical education class. Sexual orientation-based discrimination gives rise to an equal protection claim, citing Nabozny in support of this conclusion. There was no rational basis for the actions taken against Massey by the school defendants. As to the second prong, the court found that the right to be free of sexual orientation-based discrimination was clearly established such that the school defendants were on notice that their conduct was unconstitutional. As in Nabozny and Flores, the district court rejected the argument that the lack of a "closely analogous case law from the Supreme Court or the Ninth Circuit" would excuse the school defendants from being sufficiently aware their activities were unlawful. Id., at 1095. "It is not necessary for Plaintiff to cite a case with identical or even 'fundamentally' or 'materially' similar facts in order for the Court to determine that Plaintiff's right was clearly established." Id., at 1095-96, *n.* 8.

The school defendants also argued that Nabozny can be distinguished from their situation because Nabozny addressed student-on-student harassment and this dispute does not. The court was unpersuaded. "[I]f school officials may be held liable for failure to respond to *students'* harassment or discrimination based on sexual orientation, a reasonable 'lesson to be learned' [language from defendants' brief] is that school officials who engage in such sexual orientation-based discrimination themselves may also be liable." Id., at 1095, *n.* 6 (emphasis original).

COURT JESTERS: HORSE ¢ENT$

"They Shoot Horses, Don't They?" was the title of Horace McCoy's 1935 novel.[36] Although McCoy's opus actually had nothing to do with horses but rather dealt with a Depression-era dance marathon, the title of the book is not entirely rhetorical. At least not in the city of Canadian, Texas.

In Canadian, they *do* shoot horses.

Such was the drama played out in City of Canadian v. Guthrie, 87 S.W.2d 316 (Tex. App. 1932), whose actors played their roles during the same time McCoy was writing his book. Guthrie apparently owned the only two horses in town. One was a mare, blind in one eye but with an eye for flora on other people's property. Guthrie was engaged in hauling for a living. He teamed the mare with his other horse so that her good eye was to the outside.

[36]It was later made into a movie by the same name, directed by Sydney Pollock and starring Jane Fonda, Michael Sarrazin, Susannah York, and Gig Young (1969).

Although Guthrie stated he kept the mare confined in a corral, on several occasions "the time lock on her corral mysteriously went off and so did she, in search of tulips, dahlias, and gladioli in the neighboring lawns and flower beds," much to the chagrin of the neighbors. 87 S.W.2d at 317.

The court theorized the mare's proclivities stemmed from a "dearth of vitamins from A to Z in her home cuisine" such that "this particular mare was prone to spend her off nights prowling through the city, feasting upon the lawns, shrubbery, and gardens of her neighbors." Id.

> While her origin is shrouded in mystery, her appetite for flora of the rarest and costliest varieties indicates that somewhere back in her ancestry there had been injected a stream of royal blood. Although she had only one eye, appellant [the City] contends she could find more edible shrubbery in a single night than an experienced landscape gardener could replant in thirty days."

Id. The judge pondered whether the mare, "in her midnight excursions," may have been influenced by association with bad company, such as "porch climbers, joy riders, orchard raiders, and other nocturnal prowlers, which may account for her waywardness and utter disregard for the property rights of others." Id.

After one "midnight banquet upon orchids, delphiniums, and hyacinths," the pound took her in charge and notified Guthrie of the costs for the impoundment. Guthrie refused to pay the costs. The city hired Jess Lemley, more commonly known as "Panhandle Pete," to take "said mare's life by shooting her between the bad eye and the one not so bad. In other words, in the vernacular of gangland, when Panhandle Pete's pistol popped, she petered, for which the poundkeeper paid Pete a pair of pesos." Id.

The mayor "admitted he was accessory before the fact and had personally ordered her gentle soul sent to the great beyond and the remainder to the municipal dump ground," but he defended his actions as humanitarian because the mare was in an emaciated condition. Id., at 317-18.

> There is testimony that she was thin in flesh, indicating that she had some fine points upon which her harness could be hung. From the record, we conclude that although she may not have had a skin you would particularly love to touch (though she had seen only fourteen joyous summers), yet she had a skin which clung like ivy to her rafters with a beautiful corrugated effect upon the sides of her lithe and spirituelle form.

Id., at 317. The City of Canadian "had been converted into a one-horse town by Pete and the mayor." Consequently, Guthrie sued the city for damages, asserting the mare had great value to

him.[37] The jury returned a verdict of $60 in intrinsic and special damages but found no sentimental value that could be compensated by monetary damages.

> While, as bearing upon her sentimental value, it is saddening to known that the beautiful flower beds and onion patches of Canadians, over which she was wont to gambol in the moonlight between the hour when
>
> "Curfew tolled the knell of parting day,"[38]
>
> and some hours later,
>
> "when grey-eyed morn
> Stood tiptoe upon the misty mountain
> height
> And flecked the eastern hills with rays
> of golden light,"
>
> would know her no more forever; nevertheless, in the cold unsympathetic eye of the law, sentimental value is not recognized as a basis for damages.

Id., at 318. Apparently this case aroused considerable poetic sentiment if not sentimental value for the mare. The appellate court had previously declined to review the matter, claiming the law did not provide jurisdiction. "We suggested that as the plaintiff's mare was wont to stray into the wrong curtilage for nourishment, likewise his attorneys had wandered into the wrong court in search of damages." Id.

The attorneys scoured the laws and found a law that was passed by the Texas legislature that the appellate court admitted it was not aware of. The attorneys styled their Motion for Rehearing in two cantos.

I.

"Comes now the plaintiff, appellee,
And moves this Honorable Court to see,
That House Bill Number 304
Threw open wide the Court House door,
Of County Court in Hemphill County
Where Guthrie sought relief and bounty,
And recompense and generous meed,
For his departed wayward steed,

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[37]Although King Richard III was willing to part with his kingdom for a horse ("A horse! A horse! My kingdom for a horse!," Shakespear's *Richard III*, Act V, scene iv), Guthrie was not willing to part with the mare for anything less than $1,000 in total damages (actual, sentimental, exemplary, and loss of services). 87 S.W.2d at 317.

[38]Variation of the same language in 18th century British poet Thomas Gray's "Elegy Written in a Country Churchyard." The court also employs other lyrical passages that are reminiscent of John Milton's "Paradise Lost" but no attribution is provided.

Cut down in all her youthful pride,
When she was taken for a ride."

II.

"The court did hold, that as this mare,
To wrong curtilage did repair,
Likewise, these lawyers who here do pray,
Into the wrong court below did stray;
But this Honorable Court overlooked the fact,
That the Legislature passed an Act,
In Nineteen Hundred and Fifteen,
And Jurisdiction since has been,
In that Court whence this case came,
As in the Justice Court the same."

Id. This would seem to make this matter a horse of a different color, but hold your horses. The appellate court was more impressed with the attorney's poetic arguments than their legal research. "[A]ppellee's counsel has found too much law for his own good" because section 3 of the referenced law provided no appeal could be made to the appellate court where the judgment does not exceed $100. It didn't. Appeal dismissed.[39]

The ol' grey mare just ain't [worth] what she used to be.

QUOTABLE . . .

> But even worse is that this [Supreme] Court appears to sponsor the myth that judges are not as other men are, and that therefore newspaper attacks on them are negligible because they do not penetrate the judicial armor. Says the opinion: "But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." With due respect to those who think otherwise, to me this is an ill-founded opinion, and to inform the press that it may be irresponsible in attacking judges because they have so much fortitude is ill-advised, or worse. I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not

[39]Attorneys will be amused by some of the candid rulings of the court. There was a side issue of standing as Guthrie apparently had never paid the mare's former owner, "but since title is not involved in this action, that matter is 'dismissed for want of jurisdiction,' because we do not know what else to do with it." 87 S.W.2d at 317.

prefer good to ill report of his work? And if fame–a good public name–is, as Milton said, the "last infirmity of noble mind," it is frequently the first infirmity of a mediocre one.

> U.S. Supreme Court Justice Robert H. Jackson, dissenting in Craig v. Harney, 331 U.S. 367, 396, 67 S. Ct. 1249 (1947), a dispute where the Supreme Court reversed criminal contempt determinations made by a trial court judge against personnel with a local newspaper that distorted the facts in a judicial proceeding and fanned discontent through editorials that attacked the judge's intelligence and integrity.

UPDATES

The Pledge of Allegiance
The National Motto
The Boy Scouts of America

The saga of Michael Newdow v. U.S. Congress *et al.*, 321 F.3d 772 (9th Cir. 2003), *amended* 328 F.3d 466 (9th Cir. 2003), a challenge to the constitutionality of recitation of the Pledge of Allegiance in public schools, continues. As reported in **Quarterly Report** October-December 2002, a much-divided 9th Circuit Court of Appeals found that recitation of the Pledge in the public schools did violate the Establishment Clause of the First Amendment. This directly conflicts with the decision of the 7th Circuit Court of Appeals in Sherman v. Community Consolidated School Dist. 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992). The U.S. Supreme Court has never addressed the issue directly, but *dicta* of the court tends to indicate a majority of the court believe the Pledge's inclusion of the words "under God" is more akin to "ceremonial deism" than any Establishment Clause violation.[40] The U.S. Solicitor General has sought review by the U.S. Supreme Court. The highest court has not yet granted *certiorari*, although it is anticipated the court will do so.

Into the fray comes a peculiar case from Virginia. In Myers v. Loudoun County School Board, 251 F.Supp.2d 1262 (E.D. Va. 2003), the father of two elementary school children challenged the school district's compliance with Virginia statutes requiring the daily recitation of the Pledge and the posting of the National Motto ("In God We Trust").[41] Myers was proceeding *pro se*, as is Newdow, and both are questioning the constitutionality under the Establishment Clause of the First Amendment, although Myers is also asserting a "Free Exercise" claim as well. However,

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[40]See "The Pledge of Allegiance in Public Schools," **Quarterly Report** July-September 2001 (Dana L. Long, Legal Counsel) for the history of the Pledge pre-Newdow.

[41]See "The National Motto," **Quarterly Report** October-December 2001.

the similarities end there. Newdow is an atheist. His arguments are more straight-forward in this regard: He believes the inclusion of the phrase "under God" in the Pledge entangles Church and State and has the primary effect of advancing religion rather than maintaining neutrality towards religion and irreligion. Myers argument is that such compulsory recitations and portrayals of the National Motto violate his and his children's rights because they establish a "civil religion of God and County" as a state-supported religion, which inhibits him and his children from freely exercising their religious beliefs, which specifically forbid the "worship" of a secular state because such worship is "idolatrous." 251 F.Supp.2d at 1264. Myers seeks to have the Pledge statute declared unconstitutional, recitation of the Pledge be made optional, participation in the Pledge removed as a criterion for determining student-citizenship awards, the School change the design of the National Motto poster it employs, the School remove all flags from its property except for one flagpole for each building the School operates, and the School deny facility access to the Boy Scouts of America.[42] Id., at 1264-65, *n*. 5.

The court noted the unusual arguments being raised by Myers. In most cases challenging the constitutionality of the Pledge, the allegations have been that the phrase "under God" establishes monotheism as a state-sanctioned religion, citing to Newdow.[43] Myers, however, objects to the Pledge in its *entirety* because "it creates and supports the state-sponsored religion of 'God and Country.'" Id., at 1266. According to Myers, Virginia "has subtly, slowly and surely instituted a state-supported religion in violation of the Establishment Clause, which he refers to variously as a "civil religion," "civic religion," and "God and Country" religion. Id., at 1266-67. Myers asserts the "civil religion" operates the same as sectarian religions: (1) The tenets of civil religion are recorded for posterity in a variety of songs, writings, oaths, and other assertions of devotion; (2) ritual recitations inculcate these tenets; and (3) the public schools preach the virtues and mores of this civil religion to the children entrusted to their care.

There are a number of cases that recognize the existence of an "American civil religion," but these cases involve most instances that other courts have referred to as "ceremonial deism." See Id. for collected cases. "But no court that has acknowledged the existence of a civil religion has ever found that government-sponsored activities that encourage patriotism violate the Establishment Clause." Id., at 1267.

> In this case, the civil religion purportedly advanced by the Pledge statute is wholly intended to inspire respect for country and constitutional ideals, by having students gather and in one voice recite a brief statement of those ideals. The

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[42]See "Being Prepared: The Boy Scouts and Litigation," **Quarterly Report** October-December 2001. The No Child Left Behind Act of 2001 contains a specific law known as the "Boy Scouts of America Equal Access Act," which is designed to protect equal access rights for the Boy Scouts. See 20 U.S.C. § 7905.

[43]In an interesting footnote, the federal district court wrote: "Although not squarely before it in this action, the Court specifically rejects the holding of the Ninth Circuit in Newdow and finds the rationale of that decision entirely unpersuasive." Id., at 1266, *n*. 8.

> reference to the Deity in such proclamations is theologically benign. Indeed, it has so often been repeated–now by three generations of school children–that any theological meaning it may once have had has largely been eviscerated following years of rote recital....
>
> Not only is recitation of the Pledge free enough from sectarian color, so as to conclusively qualify as secular, the statute makes clear that it is not forcing acceptance of the beliefs contained in the Pledge on any student. Specifically, the statute reads: "no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise." [Statutory citation omitted.] ...

Id., at 1268-69. The court found the Pledge satisfied Establishment Clause analysis. The Pledge statute "has a secular purpose, namely the fostering and inspiration of (1) patriotism, (2) love of country and (3) respect for constitutional principles." Id., at 1269. The Pledge statute neither advances nor inhibits religion. "In this case, the practical message of the Pledge is that the speaker supports the political ideologies on which this country is founded." There is no attempt to extinguish any particular religious practice. In fact, "the speaker is free to refrain from expressing such agreement. Therefore, the statute itself practically conveys no religious message, and at most it conveys a message of government appreciation, which pupils are free to disclaim." Id.

The court was likewise unpersuaded by Myers' arguments regarding entanglement of Church and State. "In large part, Myers rests his argument on the theory that the state's excessive indulgence in codifying patriotic displays, particularly those tinted with expressions about God, has so excessively entangled the concepts of religion and the secular, that the state has created a sort of religion of itself, by itself, and for itself." Id. The Pledge statute, the court concluded, is secular in that "it aims to foster democracy, which is both necessary to the survival of the concept and entirely independent of the religious." Id., at 1270.

The Pledge statute did not violate the Plaintiffs' Free Exercise rights by requiring them to stand and recite the Pledge, a practice Myers referred to as "idolatrous." The statute, the court noted, does not require a student to participate. Myers argued the School engages in "indirect coercive" measures to force children to recite the Pledge, including the giving of certain rewards. The reward program, however, is "neutral and generally applicable," and is not based solely or even primarily on the recitation of the Pledge. Id. There was no evidence that Myers' children have ever been punished for failing to recite the Pledge. An allegation that the "children are psychologically coerced into accepting a state endorsement of religion that conflicts with their own religious convictions" is unfounded: The Pledge is a secular statement and not a religious prayer. Id., at 1271-72. Although Myers' children sit during the Pledge and do not participate, he asserts they are being punished by being forced to listen to the Pledge. The court countered that there is no constitutional requirement that "schools must shelter students from curricular messages to which the students have a religious objection." Id., at 1272.

Myers objected to the posting of the National Motto because the poster uses "a God and Country religious design supplied by a conservative religious group." He argued the poster should be replaced with one that is "religiously neutral" by removing the American flag from the design and identifying clearly that the words "In God We Trust" constitute the National Motto "and not a declarative religious statement." Id., at 1273. The district court judge determined the American flag "is a wholly secular object that conveys no observable religious message." Id., *n.* 14. The poster's design is neutral towards religion. There is no Establishment Clause violation simply because the poster was donated by a religious group. "[N]o court has established any rule that bans the use of private religious [donations] to support secular activities in public schools." Id., at 1274.

The court also rejected Myers' arguments that the School's adherence to statutory requirements to recite the Pledge and post the National Motto violate his fundamental right to direct the upbringing of his children under the Fourteenth Amendment. "However, the fundamental right to raise one's children as one sees fit is not broad enough to encompass the right to re-draft a public school curriculum." Id., at 1275-76.

Lastly, the district court rejected Myers' arguments that the Boy Scouts of America should not be permitted to recruit in the public schools because they "are God and Country evangelists." Id., 1276. Permitting the Boy Scouts (and similar organizations) to have access to the schools is, to Myers, "an impermissible establishment of religion." Citing to the No Child Left Behind Act of 2001, specifically 20 U.S.C. § 7905, the court noted the School was complying with federal law in providing the Boy Scouts of America with equal access to its facilities. Myers' claims were dismissed.

Sexual Orientation, the Equal Access Act, and the Equal Protection Clause

Quarterly Report July-September 2002, contains an analysis of the extension of the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, and the U.S. Supreme Court's decision in Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 110 S. Ct. 2356 (1990), to the formation of student groups concerned with sexual orientation, including the unpublished Indiana decision in Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corporation. It was reported in the article that other cases also were pending, including a particularly heated dispute affecting the Boyd County High School in Ashland, Kentucky.

The federal district court issued its decision on April 18, 2003. See Boyd County High School Gay Straight Alliance *et al.* v. Board of Education of Boyd County, Ky. *et al.*, 258 F.Supp.2d 667 (E.D. Ky. 2003). The students sought to form a Gay Straight Alliance (GSA) club at the high school. Under the Equal Access Act, they sought the same opportunities as other non-curriculum related clubs to meet at school during non-instructional time, to use the school hallways and bulletin boards for posters, and to use the intercom to make club announcements during home room. The GSA club was also intended to serve as a "safe haven" from perceived and actual anti-gay harassment. The court's decision details not only incidents of verbal harassment but numerous acts of intimidation, demonstrations, boycotts, and intense, often

acrimonious presentations at school board and similar school meetings. Although the high school had other non-curriculum clubs, including the Fellowship of Christian Athletes, the GSA ran into a number of delays in obtaining approval, including suggestions that they choose a different name.[44] Eventually, the GSA club was approved, but this was met with particularly threatening protests and student boycotts. In the face of hostility, the superintendent recommended suspending all non-curricular clubs for the remainder of the 2002-2003 school year. The school board convened an emergency meeting and voted unanimously to suspend all clubs, both curricular and non-curricular, for the remainder of the school year.

Although all clubs were supposed to be banned, a number of student groups–including non-curriculum related clubs–continued to meet during non-instructional time and to use the school's facilities.[45] The GSA applied to use the facilities but was denied approval because of the school board's purported ban on all clubs. The court determined that at least four (4) non-curriculum related clubs continued to meet at the high school despite the ban. The court noted that both curricular and non-curricular groups–except the GSA–continued to meet at the school during non-instructional time, to use the public address system, and to publish information about their activities in the school newspaper. As such, the court found, the school board did not create a "closed forum," as it intended. Instead, it had created a "limited open forum," which, under the Equal Access Act, would entitle the GSA to club status. The court enjoined the school district, requiring the school to give the GSA club and its members equal access.

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at <www.doe.state.in.us/legal/>.

[44]This was also suggested in the Franklin Township case.

[45]Some of the non-curriculum groups that continued to meet included the Bible Club, the Drama Club, and the Beta Club.

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Legend

J-M (January-March)
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